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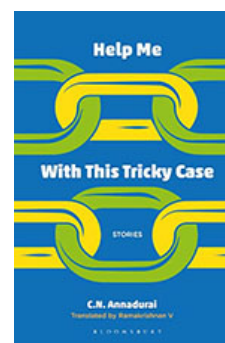
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# Jurisprudence Strategies Questioned

**Kalpana Kannabiran**----- by **Indira Jaising** *Women Unlimited*, 2006, 392 pp., 500

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Constitutionalism and gender justice in South Asia is underwritten by the colonial legacy of each of the countries in this region, that put in place plural legal systems ensuring the troubled coexistence of religious with secular/public laws, each with its own institutional apparatuses. While there are differences in the ways in which this plurality plays out, a uniform consequence has been the systematic

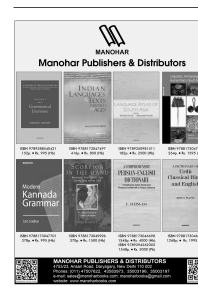
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dispossession of women through the convergence of state with community in matters related to women's entitlements – almost inevitably relegated to the private realm. The central question that Indira Jaising attempts to address is, what is the relationship between the right to the freedom of religion and the rights to equality before the law and against discrimination, especially where religion is interpreted in a way that sanctions and validates discrimination? However even before this question is posed there are more fundamental ones that must be resolved: the question of defining religion, sifting through practices to settle up which are religious practices, and then deciding which religious practices are entitled to constitutional protection under the freedom of religion provision, have led the courts to devise jurisprudential strategies that remain problematic.

Pratap Bhanu Mehta traces this process through case law, proposing in the final analysis, a theory of toleration that would be built around notions of democratization and self-determination as the only viable option for a plural democracy.

Identity is central to social existence and has become increasingly central to discourses on identity and belonging. Women find themselves in difficult positions where their sense of identity is filtered through the experience of their communities that are governed by men, exemplified in the response of the Sri Lankan woman to a question on whether she thought she faced discrimination because she was a woman or because she was a Muslim: "but I am both", cited by Ramani Muttettuwegama (p. 173). In situations where these communities are marginalized or where they are subjected to discrimination/exclusion, women acquiesce in discriminatory practices, "in the interests of the group/community" thereby reinforcing the subordinate status within the hierarchy of their religious, ethnic or tribal identity (p.25). Mapping this process of bending women's interests to community will in diverse locations, Radhika Coomaraswamy argues that questions of cultural relativism must be addressed in ways that do not derogate women's rights to economic independence and their right against torture pointing to the specific ways in which this has/might be achieved. 'The Women Living Under Muslim Laws' project by Cassandra Balchin suggests, explores this connection between democratic plurality, identity and women's autonomy in different countries, taking a careful view of law reform and its potential both to impact positively on women's status in communities and to respect cultural specificity and plurality.

A cursory look at feminist struggles in India immediately foregrounds the troubled co-existence, conflict even, of the free exercise of religion and sex equality. Martha Nussbaum traces the complexity of the questions that arise in this dilemma. While there is on the surface a polarization of viewpoints – the "secular humanist



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feminist” and the “traditionalist feminist” – she proposes that two principles might guide us out of the dilemma. The first is the principle of equal respect, which means not merely formal symmetry but “rooting out legal sources of hierarchy, and establishing a legal regime in which no groups has supremacy over another” (p. 121); the second is the principle of constraint by fundamental entitlements, namely that “fundamental entitlements shall not be abridged for any citizen, for the sake of giving religion special prerogatives” (p. 122). Faustina Pereira grounds this argument in the fatwa debates in Bangladesh, where she asserts that the “fear of loss of power has always been at the root of every resistance by the religious right against any policy or action in favour of women” (pp. 199-200), therefore, human rights advocates need to “initiate the evolution from straightforward religious doctrinaire arguments towards arguments of gender within constitutionalism and state interest” (p. 200). Salma Sobhan, on a more general level, maps the path of gender justice from colonialism to constitutionalism to islamization in Bangladesh, arguing that it is important even while speaking about equality to take serious note of the social conditions and constraints within which the debates are located, so that they may be addressed simultaneously using different public education strategies, instead of an over-dependence on the law.

But how does one resolve the dilemma that Nussbaum speaks of, even theoretically, in a context where there is a state religion coupled with the existence of plural legal systems? Jeff Redding reviews the judicial system in Pakistan looking specifically at the ways in which the different legal systems interrupt each other to the extent of quashing equality inspired legislative efforts (p. 156). Sharan Parmar examines these questions drawing on international and comparative constitutional law, and observes in her conclusion that the issues involved in the freedom of religion debates are wider than religion – they are issues that require social transformation and development (p.250). Moving equality/discrimination discourse outside the “sameness-difference” bind, Catharine Mackinnon puts forth an alternative conception that has animated anti- racism and anti sexism work in the United States and South Africa, especially, but also other parts of the world and applies this to the personal laws debates in India. Inequality in this view is “not predicated on sameness or vitiated by difference, but is a practice of social subordination, of second class status, of ranking as inferior, of historical hierarchy. In its view, the opposite of equality is not difference but hierarchy. Equality thus requires promoting equality of status for historically subordinated groups, dismantling group hierarchy” (p. 264). Rather than be paralysed by the fear of being branded culturally insensitive, she argues, the Indian state would do better to recognize that there is nothing “personal” about law and treatment based on sex (pp. 274-276) and cautions us that it “is no coincidence that what is denominated as personal is often precisely where sex inequality of women to men is crucially enacted” (p. 274). Archana Parashar attempts to establish through a historical review of

personal laws that “religious personal laws have transformed over time and that religious freedom can be enjoyed simultaneously with granting women equality in personal matters” (p. 292). While this is a valid argument, her further analysis of the ways in which minority communities must ensure equality of status for women, does not adequately theorize the complex positioning of women of minority communities, and minorities in a majoritarian society. It is not simply a matter of difference but of domination and subordination – cultural, political, material – within which these questions are embedded. Just family law therefore can only be just within a larger context of justice, equality and democracy. Historically, Muslim leadership, as Zoya Hasan points out, has not spurned state intervention altogether, citing the example of Ashraf Ali Thanawi (p. 366). While the Muslim community is diverse, hetero-genous and hierarchical, as other communities are too, what counts as leadership is an artifact of power wholly dependent of government recognition – the Muslim Personal Law Board, a male clerical body. What is significant is the convergence of the state with a non-representative body of the minority community on the one hand, and the increasingly radical voices of women against fundamentalism and for reform from within the community on the other (pp. 367-368).

This volume consisting of sixteen essays drawing on the experiences of India, Sri Lanka, Pakistan, Bangladesh and Nepal, place before us an important conversation that must be continued in greater depth and with greater intensity especially in the present times.

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